



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 27, 1998

Ms. Joni M. Vollman
Assistant General Counsel
Office of the District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR98-0266

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112093.

The Harris County District Attorney's Office (the "district attorney") received a request to review files relating to the investigation and prosecution of a particular individual regarding a "capital offense and the offenses relied on at punishment in that case." Additionally, the requestor seeks to review the "physical evidence gathered in the investigations." You state that certain documents will be disclosed to the requestor. However, you assert that the remaining documents are excepted from required public disclosure pursuant to sections 552.101, 552.103 and 552.108 of the Government Code.

We note initially that some of the information at issue includes medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the

patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 (1990) at 7. Access to medical records is governed by the MPA rather than the Open Records Act. Open Records Decision No. 598 (1991). We will address your section 552.103(a) argument in regard to the other records at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The district attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You have provided this office information showing that litigation is reasonably anticipated. You have also provided this office with a representative sample of the records at issue, and our review indicates they are related to the anticipated litigation.¹ Thus, the district attorney has shown the applicability of section 552.103(a).²

We note, however, that section 552.103(a) does not protect from disclosure information that the opposing party in the anticipated litigation has previously had access to. Absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Because we make a determination under section 552.103(a), we need not at this time consider your additional arguments against disclosure. We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. See Gov't Code § 552.101.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', written in a cursive style.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/SAB/rho

Ref.: ID# 112093

Enclosures: Submitted documents

cc.: Mr. Joseph W. Barbisch, Jr.
1912 Santa Clara, No. 4
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(w/o enclosures)